NO. 9269

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

ERIK ENAR KRISTER LOVSKOG and SVANHILD SALLY VILHELMINA ABRAHAMSSON,

*Appellants,*

*vs.*

AMERICAN NATIONAL RED CROSS,

*Appellee.*

# Brief for Appellants

UPON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA DIVISION NUMBER ONE

H. L. FAULKNER,
N. C. BANFIELD,
GROVER C. WINN,
Attorneys for Appellants.

## SUBJECT INDEX



### STATUTES CITED



### AUTHORITIES CITED

NO. 9269

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

ERIK ENAR KRISTER LOVSKOG and SVANHILD SALLY VILHELMINA ABRAHAMSSON,

*Appellants,*

*vs.*

AMERICAN NATIONAL RED CROSS,

*Appellee.*

---

# Brief for Appellants

---

## STATEMENT OF CASE

The question involved in this appeal is whether a certain writing contained on a page of a small memorandum book is the holographic will of one Gustaf Lanart, referred to also as Gus Lanart. The

memorandum was admitted to probate in the Probate Court for the Juneau Precinct, Alaska, on August 10, 1937, without notice and without hearing. The effect of the admission of the memorandum to probate as a will was to make the American National Red Cross the beneficiary, to the exclusion of the brother and sister of deceased, who are the sole heirs-at-law.

After the memorandum was admitted to probate, the two heirs, namely, Erik, a brother, and Svanhild, a sister appeared and claimed the property of deceased's estate as the sole heirs-at-law. They petitioned the Probate Court to set aside and revoke the order admitting the alleged will to probate and to adjudge them to be deceased's sole heirs-at-law. After a hearing was had and proof submitted, the Probate Court, on February 9, 1938, entered an order revoking the former order of August 10, 1937, admitting the memorandum to probate as the last will of deceased, Gus Lanart. In the last mentioned order, that is, the one of February 9, 1938, the Probate Court held that the document in question did not constitute a will, and the court found the brother and sister to be the sole heirs-at-law. (Tr. pp. 1-3).

From that order of February 9, 1938, the American National Red Cross, claiming the memorandum to be a will, and claiming to be the sole beneficiary thereunder, appealed to the District Court for Alaska at Juneau. The case was heard before the District

Court on May 31, 1938. On July 15, 1939, the District Court rendered an opinion reversing the order of the Probate Court of February 9, 1938, which had held the instrument was not entitled to probate; and on July 24, 1939, the District Court entered Findings and Conclusions and a Decree ordering the instrument in question admitted to probate as the last will and testament of Gus Lanart. (Tr. pp. 31-35). It is from that order of the District Court that this appeal is taken.

No question is raised herein as to the fact that the appellants are the sole surviving heirs-at-law of deceased and entitled to the property of the estate if the document in question is not a will.

## THE FACTS

The record is not long, and the facts submitted to the District Court are brief and are set forth in full in narrative form in the Bill of Exceptions. (Tr. pp. 53-62). We summarize them as follows:

Gustaf Lanart for a number of years lived at Gambier Bay, Alaska, where he died on December 10, 1936. (Tr. p. 60). For a number of years he had been a watchman at an old cannery there of the Pacific American Fisheries, otherwise known as the PAF (Tr. p. 59). In October 1936 just two months before his death, he came to the B. M. Behrends Bank in Juneau and left some stocks, bonds, bank books

and other valuable papers in a tin box, sealed and locked, for safekeeping, but left no directions with anyone for its disposal. The bank teller who received it was told it was being left there just for safekeeping (Tr. p. 60). After Lanart's death, the box was opened and found to contain some stock certificates, bank books, bonds, naturalization certificate, receipts, etc. (Tr. p. 61).

After opening the box, the Probate Judge, Mr. Gray, accompanied by Guy McNaughton and M. E. Monagle, went to Gambier Bay, the place where Lanart had lived on an old wannigan (Tr. p. 58). There at the house of a Mrs. Campbell, on a fox island, a certain Mrs. Matthews gave them a handful of papers, mostly bills, advertisements, radio folders, etc., but nothing of any value (Tr. p. 61). Among the papers were some loose pages of a memorandum book (Tr. pp. 58-61; Ex. 1). These papers were all water-soaked, loose and with no back. On one of the pages was written in handwriting of Gus Lanart, the following:

"After Death

"Please forward all to Red Cross, (as i don't think any relatives are alive,) the might be able to do some good with the .....
I have

"Gambier Bay
"Oct 22 1932
"Gus Lanart

"Eagles aerie No. 1 Seattle
will take care the burial

"What is not mentioned
in this will belong to
PAF Bellingham the are
the ownrs"

On some of the other pages of the memorandum book are lists of guns and various things (Tr. p. 58; Ex. 1). Some pages were missing. All the pages found were stuck together and wet and showed evidence of having been submerged (Tr. pp. 61-2). The original memorandum book containing the alleged will has been sent up with the record for the inspection of the court. (Exhibit 1).

Lanart's name was originally Gustaf Lanart Lofskog, and it was changed at the time of his naturalization to Gustaf Lanart (Tr. p. 62).

Appellants admit that at the time of his death, and in October 1932, Lanart was over twenty-one years of age, unmarried, and of sound mind. There was no testimony regarding Lanart's habits, previous place of residence, associates, property rights or former occupations—nothing to show how Mrs. Matthews came into possession of the pages of the memorandum book, nor under what circumstances; nothing was introduced to show any connection between Lanart and the American National Red Cross, nor to throw any light on his motives or intentions at the

time he wrote the memorandum in the little book, nor to show in what manner he eventually disposed of it, so that we have nowhere to look for aid in interpreting the instrument in question save to the language of the writing itself, the remaining pages of the notebook and the circumstances under which it was found and the circumstances of Lanart's visit to the bank in October 1936.

## BASIS OF JURISDICTION

The District Court had jurisdiction of this case under the provisions of Section 1091, Compiled Laws of Alaska, 1933, Section 101, Title 28, U. S. C. A., and Sections 4571 to 4574, inclusive, Compiled Laws of Alaska, 1933.

The Circuit Court of Appeals has jurisdiction to review the final judgment in this cause upon appeal, under Section 225, Title 28, U. S. C. A., as amended, and by virtue of Section 4574, Compiled Laws of Alaska 1933.

The amount in controversy is more than $3,000.00.

## ARGUMENT AND AUTHORITIES

The Assignments of error are directed to appellants' contention that the trial court's findings and decree holding the instrument in question to be a will, and entitled to probate and ordering it admitted

to probate, are incorrect. The argument in support of this question naturally falls into two parts, the first of which is—Is the instrument sufficient to constitute a holographic will, or any will, under the law, regardless of the identity of the beneficiary?, and, second, if the instrument is otherwise valid as a will, is the alleged beneficiary sufficiently identified to entitle it to receive the proceeds of the estate of deceased?

If the instrument does not comply with the law so as to entitle it to be admitted to probate as a will, then, of course, the designation of the beneficiary is immaterial. If, on the other hand, the language of the will is sufficient to dispose of the estate of deceased after his death, but the beneficiary is not sufficiently identified, then the instrument cannot be said to constitute a will.

If we are correct in either of our contentions, the document in question is not entitled to probate, and the decision of the District Court should be reversed.

## FIRST POINT

*Is the instrument sufficient to constitute a holographic will, or any will, under the law, regardless of the identity of the beneficiary?*

The only statute we have on holographic wills in Alaska is found in Section 4624, Compiled Laws of Alaska 1933, and reads as follows:

> "Holographic wills, with or without attestation, shall be admitted to probate the same as other wills and be proved in the same manner as other private writings."

The first point to be discussed is whether the writing in question constitutes a will. It will be observed that there is one word in the instrument which is badly blurred. Mr. J. Edgar Hoover, in a letter (Ex. 3; Tr. pp. 55-6), says that some unnamed examiner is of the opinion that this blurred or obliterated word is "little." Be that as it may, the memorandum book itself containing the instrument is submitted to this court so that we do not need to rely on testimony, or documentary evidence, but we have the real evidence for this court on that point.

The trial court, in its decision, refers to the rule in interpreting wills that the intent of the testator must be ascertained and given effect. This is the law, and the trial court cited the text of Section 173, Vol. 28, R.C.L., pp. 211-214, as follows:

> "The cardinal rule of testamentary construction is to ascertain the intent of the testator and give it effect, unless the testator attempts to accomplish a purpose or to make a disposition contrary to some rule of law or public policy. All rules of construction are designed to ascertain and give effect to the intention of the testator and all rules or presumptions are subordinate to the intent of the testator where that has been ascertained. The intention will control any arbitrary rule, however ancient may be its origin,

> unless the testator attempts to effect that which the law forbids."

The last sentence of the court's quotation does not follow the text exactly, yet it gives the substance of the rule. However, that is only part of the rule, and the remaining part is found in Section 174, commencing at Page 214, Vol. 28, R. C. L., which section reads as follows:

> "It has been long settled that in constructing wills the intention of the testator is to be collected from the words of the will itself, as applied to the subject matter and read in the light of the surrounding circumstances. While as already seen, the purpose of construction, as applied to wills, is unquestionably to arrive at the intention of the testator, that intention is not that which existed in the mind of the testator, but that which is expressed by the language of the will."

Even if the trial court had applied all of the rule as hereinabove referred to, we think a mistake was made in its application, for the rule applies to the construction and interpretation of wills, and we take it that before this rule comes into operation, it must first be settled that the document being construed is a will. We think the only application of this rule would be in cases where a testator makes a valid will but some part of it is obscure and ambiguous. The rule would then apply to the interpretation of the will, and the rule would provide that the will must be so

interpretated as to give effect to the intention of the testator as found in the language of the will itself.

We are concerned here with the question of whether the deceased intended this to be a will at all. It is not a question of the construction of a will in the first instance. The first question to be determined is whether such instrument is a will or a mere memorandum, or even a document which Lanart may have thought to be a will.

In the case of *Montague v. Street*, 231 N. W. 728, at page 732, the Supreme Court of North Dakota, in an opinion which treats exhaustively the subject of holographic wills, we find this language:

> "Despite some more or less popular conception, the 'privilege of making testamentary disposition of property is not an inherent or even a constitutional right,' it is wholly statutory, and compliance with statutory requirements 'is absolutely necessary to the validity of any instrument offered as a testament.' *Moody v. Hage*, 36 N. D. 471, 162 N. W. 704, L.R.A. 1918F, 947, Ann. Cas. 1918A, 933; Estate of Carpenter, 172 Cal. 268, 156 P. 464, 465, L.R.A. 1916E, 498; In re Walker's Estate 110 Cal. 390, 42 P. 815, 30 L.R.A. 460, 52 Am. St. Rep. 104; *Alexander v. Johnston et al*, 171 N. C. 468, 88 S. E. 785, says: 'The right to dispose of property by will, being statutory, can be exercised only by following the requirements of the statute.'
>
> "Without a will property would go to the heirs, as determined by statute, and therefore it

> is only by compliance with the statutory requirements that such an heir can be deprived of his inheritance by the act of a testator, confessedly disposing of property to take effect after he has died and the property no longer has a legal owner . . . . "

We contend the instrument in question in this case is not a will for several reasons which will be hereinafter discussed, one of which is that there is no testamentary language used; another is that there was no definite description of property, and the third is that there is no definite beneficiary. The rule is that under such circumstances, in order to cure the defects and clear up the ambiguities, the court could not resort to extrinsic evidence. Much less, then, could the court reach the conclusions arrived at by the trial court in this case upon mere conjecture and speculation, without any evidence; and an examination of the trial court's opinion will show much speculation and conjecture and statements of purported facts wholly outside the record.

Quoting again from the case of *Montague v. Street, supra,* we find this language:

> "But even if executed according to law, the document falls far short of being a will. This document was signed by the decedent. We are to determnie whether it is a will. It will be noted there is nothing in the instrument itself which contains language of testamentary disposition. A 'paper must show a testamentary intent.' 1 Schouler on Wills (6th Ed.) 500. There must

be language contained therein showing the alleged testator gave or bequeathed or devised property. These words need not be used, or, if used, need not be used in their strict legal meaning, but some words must be used to show a testamentary purpose. In such cases as in re Morgan's Estate, 200 Cal. 400, 253 P. 703; In re England Estate, 85 Cal. App. 486, 259 P. 956, and similar cases, we find expressions showing the testator gave certain property or that it is her will, such as 'I, Inez Morgan hereby will,' or 'last will of Anna England' and 'after all expenses are settled the rest to be divided,' etc; or the notation, 'the will of Ellen E. Poland, I made this my will and testament,' as found In re Poland's Estate, 137 La. 219, 68 So. 415; or such terms as 'this 2000 dollars for your own use should I die sudden,' as found in *Fosselman v. Elder*, 98 Pa. 159, construed as a codicil to an existing will. This document simply says: 'Money in bank to be disposed of' and 'Donald Montague $2000.00 and Donald the ranch.' It does not say they are given, it says they are to be disposed of, that is—, some time in the future. The instrument must show the intent of the testator to give. The instrument has all the earmarks of a mere memorandum."

In the case at bar, as in the North Dakota case, there is no language to say that any property is given to anyone, and, as in that case, the instrument in this case "has all the earmarks of a mere memorandum." Let us examine it and the circumstances under which it was found. The pertinent part of the instrument and the part the meaning of which it is necessary to first ascertain in order to determine whether it is

a will would be the words "after death please forward all to Red Cross." The word "forward" is not a testamentary word. The dictionaries say it means "to transmit", "send to the place of destination", but we have not been able to find any authority in support of the contention which could be construed to mean give or bequeath. Then we have the word "all" standing alone, and we have not been able to find any authority to the effect that this could be construed to mean "all my property". Standing alone, then, the instrument does not constitute a will, for it has no testamentary words and no description of the property which is to be forwarded. Therefore, the rule that the intention of the testator must be given effect, if possible, has no application because the document does not indicate that the signer was executing it as a testator. The rule does not apply when the question involved is to ascertain whether it was the intent of a man that a certain instrument should be a will at all. That is something quite different.

However, even if the rule were applicable on the question of determining not what a man intended by certain language in an otherwise valid and certain will, but to determine whether or not an instrument was in fact a will at all, we would encounter considerable difficulty in applying the rule in this case.

As stated, the rule is that the intent to be determined must be gathered from the instrument

itself and not from what the court believed the writer intended to say, and it is fundamental that in determining this point the whole document must be considered.

> "The testator's intention which courts will carry into effect is that expressed by language of will."

> "In determining testator's intent, will's language will be interpreted in view of circumstances surrounding testator, but they will not be permitted to import into will an intention different from that expressed by its language, however clearly such different intention may be made to appear."

> *Knight v. Knight*, (Sup. Ct. Ill.) 12 N. E. 2d 649. Decided Dec. 1937.

> "The intention to be sought in constructing a will is not what by inference may be presumed to have existed in testator's mind but what he has expressed in the will."

> *In re Brown's Estate*, (Sup. Ct. Ill.) 12 N. E. 2d 710. Decided Jan. 1938.

In discussing the intention of the writer of this document, we find the following: First, the instrument is found in a little memorandum book, some of the pages of which are missing and the back of it is missing. On other pages of this book are lists of personal property, including a list of guns. Just what was on the page immediately preceding the page containing the instrument in question we do not know.

The writing in question undoubtedly directed that something be forwarded after his death to the Red Cross. Just what the Red Cross was to do with it is not known. Just what was to be forwarded it is difficult to say, but it is safe to assume that what Lanart meant was to forward some list of property contained in the little memorandum book. He intended this in October 1932. Why he subsequently disposed of this memorandum, no one knows. Appellee made no attempt to account for the finding of the memorandum book, nor to account for the fact that it had been apparently thrown away, submerged in the water and later found in the condition described by the witnesses. The court says in its opinion:

> "The will had been found in a small black grip floating in the water." (Tr. p. 16).

There is no testimony about any black grip. And again,

> "He had never been in Canada so far as anyone knows." (Tr. p. 18).

There is no testimony on that point.

At the time of the writing of the instrument, there is nothing to show that Lanart had any other property than that listed in the little book. He did not appear at the bank with the stocks and bonds and bank book, etc., until four years later. He may not have had any of that property at the time he wrote

the instrument, and while, of course, if he made a valid will in 1932, it would cover after-acquired property in 1936, still the circumstances strongly indicate that the subject of the memorandum was something listed in the book and not all of his propetry, including that which was deposited in the bank in October 1936. It is hardly likely that he would come to the bank in 1936 and leave there for safekeeping his bank books, stocks, bonds, naturalization certificate and everything of any value, and then leave a will disposing of this very property floating around in a half-mutilated memorandum book in a wannigan at Gambier Bay, a hundred miles distant.

That he did only intend to have forwarded to the Red Cross a list or lists of property set down in the little memorandum book is further borne out by the language of the instrument in question, which reads: "What is not mentioned in this will belong to PAF, Bellingham. The are the owners." He undoubtedly meant that the things to be forwared to the Red Cross were those things listed in the memorandum book, and that what was not listed in the memorandum book, but was present at Gambier Bay, where he lived, was the property of the PAF. Otherwise, this portion of the instrument makes no sense, for if he was disposing of all of his property by this instrument, as in a will, he would not be excepting any portion as the property of the PAF.

If we construe the instrument as a whole, which we must, then we must conclude that Lanart, after bequeathing all of his property to the Red Cross, declared that the remainder of it belonged to the PAF. This would not make sense.

Then, again, whether the obliterated word is "little" is for the court to determine from an examination of the document, but we submit that a man in Lanart's station in life, acting as a watchman at an old abandoned cannery, would hardly refer to the sum of $8,000.00, which was the total appraised value of his estate, as a "little." If he had that in 1932, he would not consider it "little", but much, and if he had that in 1932 and was making it the subject of a will and bequeathed it all to the Red Cross, it is hardly likely that he would impose upon the Eagles Aerie of Seattle the expense of burial. There is nothing in the testimony anywhere to indicate any motive in making this writing, nothing to indicate that he had any connection with the Eagles Aerie No. 1, and nothing to indicate what he meant by the word "all" except what is found in the memorandum book itself.

It is a fundamental rule that courts cannot make a will for a man nor reconstruct one. In order to give effect to this document as a will, it would necessarily need to be rewritten, and the very least changes that could be made in it would be a reconstruction of the words somewhat as follows: "After death, I give and

devise to the American National Red Cross all my property." This would be, in effect, writing a new instrument.

> "It is unnecessary to cite authorities to the well-established rule that the plain intention of the testator should always guide the court in constructing a will, and that all presumptions and rules of construction must yield to that intention. It must always prevail unless contrary to some rule of law or public policy or established rule of property, and it must be gathered from a consideration of the entire will. *Jones v. Miller*, 283 Ill. 348, 119 N. E. 324; *Potter v. Potter*, 306 Ill. 37, 137 N. E. 425.
>
> "On the other hand, unless the intention of the testator be clear and reasonably certain, it will not be permitted to override the plain meaning of ordinary words, or the fixed legal meaning of technical words. It is not sufficient that the court may entertain a private belief that the testator intended something different from what he actually said, but that intention must be expressed with reasonable certainty on the face of the will. While the testator may disinherit an heir, yet the law will execute that intention only when it is put in a clear and unambiguous shape. *Wright v. Page*, 10 Wheat. 204, 6 L. ed. 303."
>
> *Maddock v. Haines*, 88 Fed. (2d) 350.
>
> "If the intention of a testator is apparent from the language of a will, the court need only follow it. Cases are of little assistance because the language of one will is seldom that of another. The law must be respected, but the golden

rule of interpretation is the intent of the testator which should be made to conform to rules of law which it is presumed the testator knew and considered when drafting his will. The Court should put itself in the position of the testator at the time he made his will and consider all material facts and circumstances known to him with reference to which he used the words in the will and declared his intention. All facts and circumstances respecting persons or property to which a will relates are legitimate and often necessary evidence to enable the meaning and application of the testator's words to be understood."

*Cleveland Clinic Foundation v. Humphrys*, 97 Fed. (2d) 849.

In the case of *Robinson v. Portland Female Orphan Asylum*, 123 U. S. 702, the Supreme Court of the United States, quoting from a decision of the Supreme Court of Massachusetts, found in 128 Mass. 370, states the rule as follows:

"A decision of this question doubtless depends upon the intention of the testator as manifested by the words that he has used, and an omission to express his intention cannot be supplied by conjecture . . . . "

In *Dahmer v. Wensler*, 94 A.L.R. 1, it is held that—

"Proof of surrounding circumstances is inadmissable for the purpose of importing into a will an intention which is not there expressed. In construing a will, the testator's intention must

> be gathered from the words of the will itself. The purpose of a testamentary construction is to arrive at the intention of the testator as expressed by the language of the will, and not the intention which existed in his mind apart from such language."

It is clear that courts must find the intention of the testator to be expressed in the document, and cannot resort to conjecture, and as the Supreme Court says in *Blake v. Hawkins*, 98 U. S. 315—

> "The interpreter may place himself in the position occupied by the testator when he made the will and from that standpoint discover what was intended."

If we resort to conjecture, we may be led far afield. The rule that the intention of the alleged testator must be found in the instrument itself may well be illustrated by discussing a case where a man made a valid will, executed in writing with all formality required by law, and duly attested, and in this will he disposed of all his property in a certain manner. Then afterward he changes his mind and tells all of his friends that he does not intend that his property shall go as directed in the instrument, but that he intends to change it and he gives instructions to his attorney to change it, but that he dies before any change is made. Then we would find that his will was one thing and his intention something else.

Again, in the case of *Wright v. Denn*, 6 L. Ed.

303, the Supreme Court of the United States, in construing a will, has this to say:

> "Upon the whole, upon the most careful examination, we cannot find a sufficient warrant in the words of this will to pass a fee to the wife. The testator may have intended it, and probably did, but the intention cannot be extracted from his words with reasonable certainty; and we have no right to indulge ourselves in mere private conjectures."

The Supreme Court of Illinois, in *Karsten v. Karsten*, 254 Ill. 480, uses the following language, in which reference is made to Vol. 1, *Jarman on Wills*, 4th Ed., 409:

> "Under the statute, that, only, is the will of the testator which is in writing and signed by him, and the statutory provisions would be rendered nugatory and the door opened to all the evils which the law requiring wills to be in writing and attested was designed to prevent, if, when the written statement failed to make a full and explicit disclosure of his scheme of disposition, its deficiencies might be supplied or its inaccuracies corrected from extrinsic source . . . ."

In the case at bar we do not even have any extrinsic evidence upon which to base a conclusion that what Gus Lanart meant by the word "forward" was actually "give and bequeath", and that what was meant by the word "all" was all property of which he should die possessed, or to determine what he meant

by declaring the remaining property to be that of the PAF. No evidence whatsoever was introduced, and the determination of this was left to mere conjecture and speculation.

In the case of *Hartman v. Pendleton*, 186 Pac. 572, the Supreme Court of Oregon states the following:

> "The remark of Tindal, Ch. J., in Doe ex dem. *Clarke v. Ludlam*, 7 Bing. 279, 131 Eng. Reprint 108, is one of universal application: 'I agree in the necessity of adhering to general rules in the construction of wills and other instruments. It is expedient that such rules should be held sacred, because they withdraw the decision from the discretion of the individual judge, and prevent him from pursuing his own views of each particular case. And there is less inconvenience in the hardship which may sometimes be occasioned by a strict adherence to the rule, than in the confusion which must follow on departing from it.' "

In *Jarman on Wills*, Vol. 1, P. 645, we find the following:

> "To the validity of every disposition, as well of personal as of real estate, it is requisite that there be a *definite subject and object;* and uncertainty in either of these particulars is fatal.
>
> "A simple example of a devise rendered void by uncertainty as to the intended subject matter of disposition is afforded in the case of *Bowman v. Milbanke*, where the words 'I give all to my mother, all to my mother,' were adjudged insuf-

ficient to carry the testator's land to his mother, as it was *wholly doubtful and uncertain to what the word 'all' referred.*

In *Mohun v. Mohun*, the will considered merely of these words: 'I leave and bequeth to all my grandchildren, and share and share alike * * * It had been contended that the whole difficulty would be removed by the transposition of the word 'all', which in its present position, was without effect, the word 'grandchildren' including all who correspond to that description; but his honor observed that there was uncertainty both in the subject and object of the bequest, and the court could not transpose words for the purpose of giving meaning to instruments which had none.

"To authorize the transposition of words, it is clearly not enough (as shown hereafter) that they are inoperative in their actual position; they must be inconsistent with the context. In the case just cited the word 'all', though silent where the testator has placed it, was not repugnant; and it is observable that the transposition of the word 'all', even if justifiable, would not, according to *Bowman v. Milbanke*, have supplied a definite subject of disposition."

See, also, *Dreyer v. Reisman*, 96 N. E. 90. In that case the alleged will devised and bequeathed "unto my living son and daughter, share and share alike, the same to be equal divided between themselves." The court held this will to be invalid for uncertainty, and held that while the testator undoubtedly intended to divide all of his property between his living son

and daughter, he did not express that intention in the will, and that the court could not supply the words to express the intention.

If the court is to be permitted to resort to conjecture and to reconstruct this instrument as a will and base its reconstruction upon what the court thinks was the intention of the testator, then the heirs-at-law, the brother and sister, would be entitled to have the court take into consideration the fact that the whole thing was predicated upon the assumption that they were not living, and to conclude that if they were alive, the intention of Lanart would have been something entirely different, for he clearly states that what he is doing is done for the reason that he did not think his relatives were living, and the court, of course, would have to take into consideration the well-known rule as laid down in 28 *R.C.L. P.* 229, *Sec.* 190, and which is of universal application, and reads as follows:

> "The heirs of a testator are favored by the policy of the law and cannot be disinherited upon mere conjecture, and when the testator intends to disinherit them, he must indicate that intention clearly, either by express words or by necessary implication . . . . In the absence of plain words in the will to the contrary, the presumption is that the testator intended that his property should go in the legal channel of descent, and if it is uncertain and doubtful whether the testator intended to devise real estate, the title of the heir must prevail. There is no presump-

> tion from the fact that he made a will, that the testator meant its construction to be at all possible points inconsistent with the statute of distribution. *Instead the law favors that construction of a will which conforms most nearly to the general law of inheritance.*" (Italics ours).

If the court can say that from this instrument it was Lanarts intention to give and bequeath all his property to the American National Red Cross, then it also appears that such intention was predicated upon the contingency that no relatives were alive. Wills are permitted only by virtue of the statute. They are creatures of the statute, and, in the absence of a will, a deceased person's property descends to his heirs, and a document cannot be loosely, or what is sometimes termed "liberally", construed when the result would be to disinherit heirs-at-law.

In its decision upon which the trial court based its Findings and Decree in this case, a quotation is given from 28 *R.C.L. Secs.* 177-178, part of which reads as follows, at p. 219:

> " . . . . Accordingly in interpreting wills favor will be accorded to those beneficiaries who appear to be the special objects of the testator's bounty."

This is correct, but there is another and paramount rule of construction to which the rule cited by the lower court is subject, and that rule is as follows:

"Where an ambiguity exists in a will, unless there is a manifest intention to the contrary, a presumption that the testator did not intend to disinherit his heirs at law or next of kin, but intended that his property should go in accordance with the laws of descent and distribution, will be applied as an aid in construing the will; and a testator's heirs at law or next of kin will not be disinherited by mere conjecture, but only by express words in the will or by necessary implication arising therefrom. An intention to disinherit an heir will not be imputed to a testator by implication, nor where he uses language capable of a construction which will not so operate . . . . "

69 C. J. Sec. 1149, p. 97 et seq.

"Where testamentary intention is not clearly shown, the heirs are favored and are entitled to the benefit of the doubt affecting their rights."

*Thompson v. Randall*, 153 S. E. 249.

If we are going to ascertain Lanart's intention from something outside the will, or from mere conjecture, would it not be reasonable to assume that what he intended in October 1932 was not what he intended in December 1936? We might well find that he changed his intention and threw the alleged will away. The facts bear this out, for it was found submerged in the water, while everything of value which he had had been placed in the bank for safekeeping, without any directions for its disposal.

## SECOND POINT

*If the instrument is otherwise valid as a will, is the alleged beneficiary sufficiently identified to entitle it to receive the proceeds of the estate of deceased?*

In other words, if there is a definite subject, and the court can insert after the word "all" in the document the words "my property" or "the property of which I may die possessed" and ignore altogether the reference to the property of the PAF, then is there a definite object? The testator uses the words "Red Cross" with nothing more, and the court in Finding of Fact Nos. 7 and 8 (Tr. p. 33) finds that the testator meant to designate the American National Red Cross as his beneficiary, and concludes in Conclusion No. 2 (Tr. p. 33) that the American National Red Cross is the sole devisee of Gus Lanart, and adjudges in the Decree that the American National Red Cross is the sole devisee (Tr. p. 35).

The words "Red Cross" do not describe any organization or corporation. It may well be that Lanart meant the American National Red Cross, but the document does not say so, and the court cannot designate the American National Red Cross except upon extrinsic evidence. Of course, it is a well-known rule in the construtcion of wills that extrinsic evidence may be introduced for the purpose of showing just who or what was meant by a beneficiary improperly

named or whose identity is uncertain. For instance, if a man wills his property to John Smith of Douglas, Alaska, and there are two John Smiths, a father and a son, the court could not tell on the face of the instrument what the testator meant, and could not arbitrarily say that the testator meant to give it to the father, and neither could it say that the testator meant to give it to the son. In such cases, resort may be had to extrinsic evidence to show what the testator really intended. The will would be, to all intents and purposes, valid on its face, but it would contain a latent ambiguity. The trial court seems to have missed the distinction between a latent ambiguity and a patent ambiguity. In the illustration given hereinabove, extrinsic evidence could be introduced, for instance, to show that John Smith, the son, had lived with the testator, perhaps attended him during his last illness, rendered him many favors, contributed to his support at times, and that could be taken into consideration by the court in determining which John Smith was meant; but the court could not resort to conjecture to determine this; and evidence would be necessary.

In the case at bar there was no evidence to throw any light upon what Gus Lanart meant by the term "Red Cross". We may presume that he intended the American National Red Cross, but he did not say so, and no evidence was offered on this point.

It is a well-known fact that there are many organizations with the words "Red Cross" in their names—there is the Canadian Red Cross, the Swedish Red Cross, and several others. There is one in England and in other countries. The writer of the instrument was a "Swede". It is just as reasonable to assume that he meant the Swedish Red Cross as that he meant the American National Red Cross. It would have been easy for the proponent of the alleged will, the appellee herein, to have introduced some testimony, if such existed, showing that Lanart had some connection with the American National Red Cross, but we do not find one word. If he had any connection with the American National Red Cross, it would have been an easy thing to prove, for lists of its subscribers must be available. Undoubtedly he would have among his papers somewhere receipts, letters or some indication that he had some connection with the American National Red Cross, if such is the fact.

The words "Red Cross" standing alone do not describe any entity, and we contend there was nothing before the trial court upon which to base a conclusion that what was meant was the American National Red Cross. In such cases as this devises and bequests, if made in a will duly executed, have been upheld by the courts only where there was extrinsic evidence to show what the testator meant by the words. This point is well illustrated in the case of *New Jersey Title Guaranty & Trust Co. v. American National Red*

*Cross*, 160 Atl. 843. In that case the testator made a will in due form, and, after certain specific bequests, he provided that the residue be given, devised and bequeathed to the New Jersey Chapter of the American Red Cross. There was no New Jersey Chapter of the American Red Cross, but there was a chapter known as the Jersey City Chapter of the American Red Cross, and the court held that the testator meant the Jersey City Chapter of the American Red Cross; but the court did not arbitrarily find that, but found it only after evidence was presented before the court showing that to be the intention of the testator and showing his connection with the Jersey City Chapter of the American Red Cross through a long period of years, and that he had belonged to it for many years, was a frequent contributor and actively interested in its work, but these facts had to be established by evidence. The court could not assume them.

We submit that under the rules of law and all decisions which we have examined, in order for the court to determine that what Lanart meant was the American National Red Cross, and not the Canadian Red Cross, or the English Red Cross, or the Swedish Red Cross, there would need to be some evidence introduced; and we submit that if there is any merit in the contention that the American National Red Cross was meant, it was a fact easily susceptible of proof —at least some proof — and none was offered or attempted.

This contention is further illustrated in the case cited by the lower court on pages 14-16 of the opinion. That is the case of the *State of South Dakota v. American National Red Cross*, 245 N. W. 399. The appellate court, in upholding the trial court in that case, uses this language, as cited by the trial court herein on page 16 of the decision: (Tr. p. 26).

> "We feel that the learned trial court was fully justified *under the evidence in so finding* . . . . " (Italics ours).

Again we find in the South Dakota case, at page 401, the concluding paragraph, which is not cited by the trial court herein, and which is as follows:

> "The findings of fact of the trial court are *in harmony with the evidence* . . . . " (Italics ours).

As we have said hereinabove, there is a distinction between a patent ambiguity and a latent ambiguity apparent on the face of a document. In the case of wills, no evidence of any nature is permitted to be introduced to clear up a patent ambiguity—that is, one appearing on the face of the will. In this case, no evidence could be introduced to show what the testator meant by the word "forward", nor to show what he meant by the word "all". These are patent ambiguities. That is illustrated in the case of *Karsten v. Karsten*, 254 Ill. 480. The will under consideration in that case contained the following lan-

guage: "It is my will that my daughter Mary and my son Charles and my daughter Anne shall be equally divided between all three." The court said that it was undoubtedly the intent of the testator to divide some property between these three children, but since he did not say so, the court could not reconstruct the language, or add words to it, and that it was of no force or effect. It contained a patent ambiguity, or one appearing on the face of the will. On the other hand, a latent ambiguity is one which does not appear on the face of the will, but arises when we seek to put the will into operation, as discussed in the illustration we have given hereinabove. In such cases, evidence may be introduced to clear up the latent ambiguity, but it cannot be cured or removed by the court's speculation or conjecture.

In the illustration which we have given hereinabove of the two John Smiths at Douglas, there would be no ambiguity on the face of the will, for it does not appear that there are two John Smiths, and the ambiguity does not arise until it is sought to carry out the terms of the will. No ambiguity arises in the document under consideration herein until it is sought to carry out its terms, and then if it is construed to be a will, we encounter the fact that there is no such organization as the Red Cross; and to determine that the testator meant an organization having some other name, although similar, proof of that fact must be supplied.

## CONCLUSION

In seeking to construe the instrument as a will sufficient to transfer the property of deceased to the American National Red Cross, we find at least four insurmountable objections, each one of which, in turn, has been deemed by the courts sufficient to deny probate to instruments of similar character. First, there are no testamentary words used, and the word "forward" does not mean give or bequeath. The second is the word "all" standing alone cannot be construed to mean all of the deceased's property and that the courts are not permitted to add sufficient words to give it that meaning. The third is that the words "Red Cross" do not describe any entity; and the fourth is that the mention of the fact that the title to all other property is in the PAF makes the instrument puzzling, to say the least, even if otherwise explicit.

In other words, there is the absence of testamentary words, no description of property, the indefinite and ambiguous language employed, the inconsistent statements concerning the title to the remainder of the property, the incomplete designation of any beneficiary, and, lastly, the reference to relatives. For all anyone knows, the decedent might have heard between October 1932 and December 1936 that relatives were alive and he concluded to throw the memorandum in the waters of Gambier Bay. At any rate,

he apparently attached no importance to it in 1936, either for the reason that it had already served its purpose, or that the property listed had been disposed of or that he had changed his mind, and he then threw the memorandum in the Bay.

In many states, the law relating to holographic wills provides that such instruments, to be valid, among other requirements, must be found among the valuable papers of the decedent. We do not have such a statute in Alaska; but the reason for the requirement in many state laws is apparent, and, while our law does not have this provision, still the fact that the valuables of deceased, everything of importance, were all deposited in the bank for safekeeping, with no directions for disposal, while the memorandum under consideration was apparently abandoned, thrown away and discarded, should be a very significant fact to be taken into consideration in determining Lanart's intention; and it seems apparent that what he intended to have done in 1932 was to have some specific articles of personal property, now unascertainable, delivered to the Red Cross, after his death, that apparently between 1932 and 1936 these articles had been disposed of, for the testimony shows that nothing of value was found at Gambier Bay, that whatever was meant by the memorandum might well have been already forwarded to the Red Cross during the life of deceased, and that there was no further use for the memorandum. There are stronger reasons

for assuming this, under all the circumstances, than there are for concluding that the memorandum was intended as a will, disposing of all the property to the American National Red Cross.

Then, again, while we think, in any event, the document is too vague, uncertain and ambiguous to be construed as a will at all, the rule against conjectures, strained construction and the importation of language into the document is much more rigid when there are heirs-at-law whom such construction would disinherit than it would be if no such heirs existed. Furthermore, the document does not say that Lanart is giving anything to the Red Cross. It does not say that anything is to be the property of the Red Cross. It does not say what the Red Cross is to do with it. It does not say which Red Cross.

Let us assume, for the sake of argument, that we should find this instument with the property of Lanart at Gambier Bay, after his death, that the property included all of his valuables, all those which were left in the bank, that there were no contest, that the property considered wholly of things which could be carried in the mails, and a person attempted to follow the directions contained in the instrument and the forwarder should place the package in the post-office, addressed simply to the Red Cross. Where would it go? It would certainly find its way to the nearest local chapter, which would, of course, be the

Juneau Chapter, and it would not be sent to the American National Red Cross at Washington, which is now claiming it, and the result would be wholly different from that which we will have if the trial court's decision is permitted to stand. Or, let us suppose that the finder of the property and the instrument should decide that what Lanart meant by the words "Red Cross" was the American National Red Cross, and not the Juneau Chapter, and he should forward the package to the American National Red Cross. What could the American National Red Cross do with it under the law and in obedience to the only direction contained in the will? The property would then have been "forwarded" to the Red Cross, and the next step would be that the American National Red Cross would have to administer on it, for an estate of a deceased person cannot be transferred merely by delivery. The creditors have a right to subject it to the payment of their claims. The Territory has a right to the payment of the inheritance tax due it under the provisions of Section 3091, Compiled Laws of Aalska 1933. This section provides for the imposition of an inheritance tax, and such tax would be levied under the provisions of Subdivision (1) of Section 3091, Compiled Laws of Alaska 1933, which reads as follows:

> "(1) When the transfer is by will or by intestate laws of this Territory from any person dying possessed of property while a resident of the Territory."

An administrator would have to be appointed, and, then, suppose in the course of administration, the brother and sister appeared and claimed the residue of the estate. Could the American National Red Cross claim it to the exclusion of the heirs? We think not, for their connection with it would have ended. It would have been "forwarded" to them, as directed, and the deceased's command or wish, as expressed in the plain language of the document, would have been fulfilled. Even if the property had been sufficiently described and the words "Red Cross" could be construed to mean the American National Red Cross, and there were no other inconsistencies or ambiguities in the document, we think the most that could be claimed by the American National Red Cross would be the right to administer the property.

We think, therefore, that the Probate Court was right in its order of February 9, 1938, the concluding part of which reads as follows:

> "Now Therefore, it appearing to the Court, that there is some reasonable doubt as to the purported Will, and that the legal claims of the sister and brother as heirs is sufficiently proved and established, in consequence thereof.
>
> "It is hereby adjudged and ordered, that the purported Will as admitted to probate on August 10, 1937, he set aside and the Letters Testamentary with Will Annexed issued on that same date be revoked, and furthermore,

> "It is hereby decreed that Erik Enar Krister Lovskog and Svanhild Sally Vilhelmina Abrahamsson, a brother and sister of the deceased, are legally the sole heirs."

and that the District Court was wrong in reversing that order.

Respectfully submitted,

H. L. FAULKNER,

N. C. BANFIELD,

GROVER C. WINN,

Attorneys for Appellants.